UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

April 12, 2002

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:07 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Item #1. Approval of the Minutes of the March 14, 2002 Commission Meeting.

The minutes of the March 14, 2002 Commission meeting were distributed to the Commission and made available to the public.

Commissioner Knox moved that the minutes be approved.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Item #2. Public Comment.

There was no public comment at this time.

Item #3. Proposition 34 Regulations: Repeal and Permanent Adoption of Amendments to Regulation 18428, Reporting by Affiliated Entities (§ 85311).

Senior Commission Counsel Larry Woodlock reviewed the Commission's December 2001 decisions regarding the regulation, noting that the Commission eliminated references to Proposition 208 and brought the regulation into conformity with Proposition 34. The Commission adopted technical clean-up amendments as an emergency regulation. During the last month, staff received criticisms regarding other provisions of the regulation. The staff memorandum addressed those concerns, and included clarifying amendments to the emergency regulation. Staff recommended that the emergency regulation be permanently adopted with staff's proposed clarifications, thus avoiding the resurrection of a regulation that would not conform to Proposition 34's affiliation standards. Staff believed those clarifications would be useful and were within the notice. If the Commission chose to adopt the regulation as recommended, then staff also asked that the Commission repeal the prior emergency regulation.

In response to a question, Mr. Woodlock agreed that more substantive issues still needed to be addressed, and staff would be asking the Commission whether regulations 18428 and 18419 (the sponsored-committee regulation) should be reviewed by staff in the future.

In response to a question, Mr. Woodlock explained that the proposed change to line 18 of regulation 18428 would clarify that the list of names of all affiliated entities would not be

required, in accordance with the following sentence which clearly stated that the names of each affiliate need not be listed. Without the clarifying change, the two sentences seemed inconsistent. He stated that the change would be in keeping with the spirit of the Commission's intentions.

Commissioner Downey stated that the recipient of a contribution is required to report the contribution and list the name of the contributor and its affiliated entity. He believed that the language on line 19, "Upon receiving notice," was confusing and appeared to impose a trigger for reporting purposes.

Mr. Woodlock responded that the language was not intended to create a reporting trigger, and agreed that the language, "Upon receiving notice," could be deleted.

After further discussion, the Commission agreed that the phrase should be deleted.

Commissioner Swanson moved that the emergency regulation be repealed, and that staff's proposed regulation 18428 be adopted as a permanent regulation with the deletion of the words, "Upon receiving notice."

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

Chairman Getman suggested that a more substantive review of the regulation be conducted by staff later in the year.

There was no objection from the Commission to adding the review to the regulation calendar.

Item #4. Conflict of Interest Regulations Improvement Project: Pre-notice Discussion of Amendments to Regulation 18707.4, Public Generally - Appointed Members of Boards and Commissions.

Senior Commission Counsel Hyla Wagner presented several proposed amendments to the regulation. She explained that it was one of six "public generally" regulations, and created an exception from the conflict-of-interest rules for members of boards and commissions who are appointed to represent a particular economic interest. Since the Commission last considered the regulation in December, staff had conducted an interested person's meeting and had further reviewed how the regulation has been applied in Commission advice.

Ms. Wagner noted that there did not appear to be major issues with the functioning of the regulation. She noted that the regulation had judicial approval, and that the *Callanan* and *Overstreet* opinions by the Commission provided good analysis of the issues that continue to be relevant. Staff advice letters fit within the guidance provided by the *Consumer's Union* case and the opinions. Consequently, only minor revisions to the regulation were necessary.

Ms. Wagner identified two minor issues with regard to the regulation. First, the statutes that created a board did not always meet the second requirement of the regulation, specifying that the board member have the economic interest that they represent. Additionally, the "significant

segment" language of the regulation is difficult to apply because it required cross-referencing to other "public generally" regulations where the standards did not quite fit.

Ms. Wagner pointed out that sometimes the statute contemplates that the official will have the economic interest he or she represents, but does not specifically require it. Staff recommends that regulation 18707.4(b) include language permitting the official's economic interest to be implicit. Staff also recommends changing the language of 18707.4(a)(3) to add the concept of foreseeability. Staff further recommends that 18707.4(a)(4) include a standard defining what constitutes a "significant segment," and proposes that 50% or 75% of the persons the member was appointed to represent be considered. She noted that 50% was the highest amount allowed when cross-referencing the regulations. Past advice letters appear to be consistent with the 50% level, but a 75% level would change the outcomes of at least two prior advice letters. Staff was trying to make the regulation easier to apply and not change the outcomes of past advice. Staff believed that the percentage should be high because the groups are small in those types of situations, but not so high that the regulation cannot be used where it is appropriate.

Commissioner Knox questioned whether statutes require that the appointee represent a specific interest or that the appointee have the specific interest.

Ms. Wagner responded that most of the statutes require that the appointee represent specific interests. When the statute required a specific expertise but did not specify that the appointee represent a specific interest, the exception would not apply.

In response to a question, Ms. Menchaca stated that the "proportionally" language of 18707.4(a)(4) would be applied with a percentage test.

Ms. Wagner stated that there were not any advice letters specifically focusing on that standard, and that the letters usually focus on the "substantially the same" standard.

Chairman Getman noted that "substantially the same" has been interpreted to be fairly identical, providing a strict standard.

Ms. Menchaca gave the example of a statute requiring that all chiropractors pay a fee to a board, which is a percentage fee based on the size of the practice. If there are no facts to apply the proportionate standard, staff would use the "substantially the same" standard.

Chairman Getman pointed out that a decision may not have substantially the same effect on two landlord representatives who are required to be on a board because the number of rental units each owns is not the same. However, a 1% increase in rental rates could have the same proportionate effect on them.

Commissioner Knox discussed the issue with respect to a landlord who owns large numbers of both residential rental units and commercial spaces, and noted that the "proportionate" standard would only apply to like holdings.

In response to a question, Ms. Wagner stated that the 50% or 75% threshold might be difficult to calculate, but that the regulated community uses those calculations.

In response to a question, Ms. Wagner agreed that the 75% option was very high, and suggested that the 50% standard might be more appropriate.

Commissioner Downey agreed that there was a need to define "significant segment" if that phrase was used. He suggested that the word "majority" could be used.

Ms. Wagner noted that the "significant segment" concept is used in all of the "public generally" regulations, and the term is used in many opinions.

Commissioner Downey supported 50% instead of 75%.

In response to a question, Ms. Wagner stated that using "majority" would not create any problems with the substance of previous advice letters.

In response to a question, Ms. Menchaca stated that it is difficult to quantify an amount when dealing with less than a majority. "Majority" would ensure that a majority of the persons affected are part of the "significant segment" calculation. It would be important to keep the "significant segment" aspect, because the second part of the "public generally" analysis included the "substantially the same" or "proportionate" determinations. When there is a smaller population, it assures that all persons are affected almost identically. The public is used to the two-pronged analysis and it is consistent throughout the "public generally" regulations. She stated that replacing "significant segment" with "majority" might lead people to believe that "significant segment" would no longer be used. She suggested that the last sentence be kept, and that "majority" or a percentage be inserted.

Commissioner Knox presented a hypothetical situation whereby no individual product of an industry ever constitutes 50%, even though an official may have a financial interest in a number of different products in the same industry.

Ms. Wagner responded that the *Callanan* opinion dealt with that type of situation, where a dispute arose between two segments of an industry. The opinion allowed the officials to vote.

Chairman Getman stated that the concern is with officials who have a conflict of interest in the very industry they represent and regulate. The concept of the proposed regulation would allow them to participate in general regulations that affect the industry in substantially the same way as they affect the official. If the official has a financial interest in a specific individual product of that industry and is asked to consider a regulation dealing only with that individual product, the official would not be allowed to participate because the regulation does not affect 50% of the industry in substantially the same way.

Commissioner Knox presented a hypothetical scenario, involving three different types of peaches in a single peach industry. None of the three types of peach interests comprise a majority of the industry. A representative to the peach industry board, appointed to represent the peach industry and not an individual peach interest, who has an interest in all three types of peaches, might not be able to vote on anything because of his interest in all three types of peaches under the proposal.

Ms. Wagner noted that most of the board's regulations would apply to items like pesticides that would affect the whole industry, not a particular type of peach. The official would be allowed to vote on anything affecting the entire industry.

Chairman Getman pointed out that the regulation usually works, and that 50% is often currently used.

Ms. Menchaca stated that the regulation has historically been given an expansive view. If the Commission adopts the proposed changes, staff would have greater flexibility in determining whether the standards have been met.

In response to a question, Ms. Wagner explained that the regulation provides an exception once a conflict had been established.

Ms. Menchaca stated that step three required that there would have to be a reasonably foreseeable material financial affect, and that staff did not believe that the language needed to be added to this regulation.

Commissioner Swanson pointed out that the Commission should protect the public from special interest influence, but that it is important for officials to have expertise in order to help the group that the official represents.

Ms. Wagner noted that the regulation permits those officials to serve on the boards and that the regulation has been working. The proposal would make small changes that would make the regulatory authority clearer.

Chairman Getman pointed out that Ms. Wagner conducted research to learn whether there were difficulties recruiting people to serve on the boards because of the regulation, and learned that there were no problems.

Ms. Wagner assured the Commission that staff would bring the issue back to the Commission if problems arose.

Chairman Getman pointed out that the issue was first brought to the Commission's attention as a result of a concern from LA Health Care.

Commissioner Downey moved that proposed regulation 18707.4 be approved, with the insertion of the 50% language in subdivision (a)(4).

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

Item #5. Discussion of Project Proposals – Conflict of Interest Codes and Statements of Economic Interests.

Ms. Menchaca reported that staff had developed project proposals for 2002 for issues pertaining to conflict of interest codes and statements of economic interests. All of the proposed projects were worthwhile projects to consider. The staff memorandum described the projects, and broke them down into three categories.

Ms. Menchaca explained that Part A dealt with conflict of interest code issues, Part B dealt with disclosure, and Part C dealt with other miscellaneous projects. Ms. Menchaca explained that staff recommended that certain projects should be prioritized.

Ms. Menchaca stated that project B(2) dealt with disclosure and the definition of "investment." Staff receives many questions about investment disclosure and disqualification. It is a complicated matter and appears to be confusing to the public. Both Legal and Technical Assistance Divisions believe it should be a priority.

Commissioner Downey agreed that it should be the highest priority of the projects outlined.

Ms. Menchaca stated that project A(2) dealt with the Commission's role with respect to local government agencies and would be a high priority project for the Legal Division. The issues involved the assistance staff could provide local agencies in determining whether they are public officials or consultants, and how to determine whether a particular public official should be designated in a conflict of interest code.

Ms. Menchaca explained that project A(2) dealt with disqualification obligations of public officials and how those issues enter the purview of the Commission, and that they would deal with disclosure issues with regard to some public officials. Staff found that individuals may ask for written advice as to whether an individual is or is not a public official, whether they have a filing obligation, and whether they should be included in the conflict of interest code. The code reviewing body should determine whether the person should be included in the conflict of interest code, and Legal Division currently provided technical assistance for the determinations, but did not second-guess the local government agency determinations. As more people become aware of the requirements through the FPPC's outreach programs, more questions are asked. Staff recommended that the regulations be amended to describe when it would be appropriate to request written advice.

Chairman Getman noted that it was discomforting to bring Enforcement actions that fine someone for failing to file an SEI without being able to determine whether that person should have been required to file the SEI. She discussed a past enforcement case against a lifeguard, noting that the Commission had to determine a fine amount for a lifeguard who failed to file an SEI, but could not participate in determining whether the lifeguard should have been required to file in the first place. She suggested that the only remedy would be to have the FPPC review conflict of interest codes for local agencies. This would require legislation as well as more staff.

Ms. Menchaca responded that the statute requires that the conflict of interest process be done at the most decentralized level. She suggested a process that would allow public employees to bring the issue to the Commission for a determination. She stated that the public believed that the Commission should have that role and that they feel frustrated because, if they disagree with the agency's determination, their only alternative would be to seek a judicial remedy.

Commissioner Swanson stated that the FPPC should assist the local agencies, even though it would require legislative changes and more work for staff. Both small and large jurisdictions need to have the freedom to have their own regulations, but they could not be in conflict with state regulations. She presented an example illustrating that the current system may provide an inherent conflict in a local jurisdiction if elected officials are the employer of the city clerk. There must be an open door from the local jurisdictions to the FPPC for rulings.

Chairman Getman agreed that this was a very important project, but warned that it would be a very big project.

Technical Assistance Division Chief Carla Wardlow agreed, noting that staff was informally looking at local codes and found many problems.

Commissioner Knox pointed out that there is a judicial remedy available to resolve the problems.

Chairman Getman responded that, in her example, a lifeguard would have had to file a court action, and the court would not have the benefit of FPPC expertise to determine whether the lifeguard should have been included. The FPPC is not a part of the process until it has to impose a fine.

Ms. Wardlow stated that all of the projects were important. She believed that project B(2) (The Definition of Investment), was an important project that would also be a huge undertaking. Staff receives more questions each year from officials who want to know what they need to disclose. She agreed that the local government issues were also important, and that, project A(6) (Model Disclosure Categories) could be included as part of project A(2).

Chairman Getman agreed, noting that it was particularly important if the model was allowed to have the same impact that the FPPC model code had on state agencies, becoming the *de facto* code for agencies.

Ms. Wardlow noted that it would even be helpful just as a guide.

Enforcement Chief Steve Russo stated that project A(2) was very important to the Enforcement Division. He noted that project A(7), which addressed interaction between code filers and individuals who manage public investments, was an important project. He explained that there was sometimes disagreement in Enforcement cases when determining whether a person manages public investments, or whether that person is more properly designated as a code filer. Individuals have tried to litigate that issue through an enforcement action and staff did not believe that was appropriate.

Mr. Russo stated that project A(5) was also important because it addressed how individuals are designated in a conflict of interest code, which sometimes arises during Enforcement actions. It would be helpful to know the degree of particularity that may be required so that there is no ambiguity as to whether someone is designated in a code.

Chairman Getman synopsized that staff prioritized projects B(2), A(2), A(7), A(5), and A(6), with A(2) and A(6) being combined projects.

Ms. Menchaca stated that the conflict of interest code projects overlap and would be addressed together.

Chairman Getman moved that staff prioritize projects B(2), A(2) combined with A(6),A(7), and A(5).

Commissioner Knox seconded the motion.

There being no objection, the motion carried.

The meeting adjourned for a short break at 10:22 a.m.

The meeting reconvened at 10:35 a.m.

Item #6. Late Contribution Reporting Violations – Streamlined Enforcement Program.

Mr. Russo explained that the Enforcement Division was requesting that the Commission consider whether to continue the streamlined late contribution program, and what revisions to make to the program, if any, should the Commission choose to continue it. He noted that it seemed like a good time to review the program because the maximum statutory fine for a violation has increased from $2,000 to $5,000.

Chief Investigator Al Herndon gave a brief history of the program. He stated that application of the program to the 2000 primary election had been completed and application of the program to the 2000 general election was nearly complete. Staff reviewed over 12,000 late contribution transactions in connection with the 2000 election cycle. The review resulted in 64 streamlined settlements with administrative penalties totaling approximately $145,000.

Mr. Herndon reviewed the key components of the program as explained in staff's memorandum. He explained that approximately 85% of the respondents in the 2000 election cycle chose to participate in the program for resolution of their violations. He asked that the Commission approve continuation of the program, using the same basic parameters used in the 2000 election cycle.

Commissioner Swanson moved, for purposes of discussion, that the Commission continue the program.

Chairman Getman congratulated the Enforcement staff for developing a program that was both efficient and fair. She credited the program for a decrease in violations from the primary to the general election.

Commissioner Knox seconded the motion.

Commissioner Swanson stated that the program is very effective.

In response to a question, Mr. Herndon stated that the program proactively identifies and prosecutes only the non-filing of late contributions totaling $10,000 or more. The late contribution report is required for late contributions of $1,000 or more, but the Commission initially determined that prosecution of every violation was not warranted and so the $10,000 threshold was established. The Franchise Tax Board also uses that threshold to determine whether a violation is material.

Commissioner Downey noted that the non-reporting of late contributions involving less than $10,000 could still be pursued by the Commission, apart from the program..

Mr. Russo stated that the threshold was established only for the proactive program. Staff has brought late contribution reporting cases involving less than $10,000 when the surrounding circumstances justified a prosecution.

In response to a question, Mr. Herndon stated that the Commission previously decided not to require that the late contribution report be filed after a violation had been brought to the attention of the FPPC because it would delay resolution of the case. He noted that the reporting was duplicated on the campaign statements filed after the election, and filing the missing report after the election would not cure the public harm.

Chairman Getman noted that the most significant difference between the SEI expedited program and the late contribution program was that the SEI report must be filed in order for a respondent to participate in the SEI program. She noted that the purpose of the late contribution report was to get the late contribution information to the voters before the election, and that reporting the contribution six months after the election did not help the public.

Mr. Russo explained that the Commission must determine who should be excluded from the program. The Commission provided broad discretion to Enforcement staff in the past, allowing them to exclude cases when they deem it appropriate. The Commission directed staff to look very closely at any case involving a late contribution of $50,000 or more. He suggested that more precise criteria, incorporating the factors outlined in regulation 18361 for exclusion from the program, be considered.

Mr. Russo explained seven factors that were outlined in the staff memo to be used to exclude cases from the program. He asked the Commission to reaffirm its grant of discretion to the Enforcement Division to exclude cases from the program, utilizing the proposed criteria as factors staff can consider when determining whether to exclude a case from the program. He was comfortable with the use of the criteria.

There was no objection from the Commission to using the criteria.

Commissioner Swanson noted that the criteria are to be used as guidelines only, and that the Commission relied on staff's professional judgment to include or exclude cases from the program.

Mr. Herndon stated that the maximum administrative penalty for failure to report late contributions was increased from $2,000 to $5,000 as of January 1, 2001. Staff presented four options for the program's penalty structure.

Mr. Herndon outlined Option 1, noting that it would retain the existing penalty structure, incorporating the increase in the maximum administrative penalty. Under Option 1, a violation would be assessed at 15% of the unreported amount, subject to the administrative penalty cap of $5,000. Under Option 1, the penalty would be significant and would recognize the importance of the late contribution reporting provision. Additionally, to reach the maximum fine of $5,000, a late contribution of $33,333 or more would have to be made. He compared the 64 streamlined cases already processed with what the fine would be using Option 1, and noted that the fine would have remained the same in 35 of those cases. Eighteen of the cases would have had some change in the fine but would not have reached the maximum $5,000 fine. Eleven cases would have resulted in the maximum $5,000 fine.

Mr. Herndon explained that Option 2 would provide a fixed amount per violation without considering the amount of the unreported contributions. Option 2 had been rejected by the Commission two years ago. It had been considered too arbitrary because it did not take into consideration the seriousness of the violation.

Mr. Russo explained that Option 3 would impose a fine of 15% of the unreported contribution, but would cap the penalty below the statutory maximum of $5,000. Staff proposed a cap of $3,500. This would allow the Commission to impose a fine in an amount lower than the maximum $5,000 for cases handled through the expedited program, if the Commission wanted to offer a lower fine for the cases handled through the program. That would allow the Commission to utilize a higher fine for the cases not included in the program.

Mr. Russo outlined Option 4, which would impose a 15% penalty or a fixed penalty per late contribution unreported, but would allow an additional "enhancement" penalty for those cases involving large unreported contributions.

Mr. Russo supported either Option1 or Option 3. Option 1 was the current system and seemed to be working well. Option 3 would be very similar to Option 1, but would lower the maximum fine for participants in the program, thus encouraging use of the program.

Ben Davidian, from Bell, McAndrews, Hiltachk and Davidian, stated that people make mistakes on the reports. He believed that the original design of the program was to provide a "traffic ticket" type of program for first-time filing offenses where an inadvertent violation occurred. The program addressed the private attorney general actions by allowing enforcement staff a vehicle with which they could prosecute the violators.

Mr. Davidian explained that the program had changed into a strict-liability program that had resulted in a dramatic policy change. The statute stated that a filer would be penalized for failure to file the report, and that the fine would be based on the report, not the number of contributions that were not reported because the report was not filed. He believed that staff was now fining per contribution and that the issue should be discussed by the Commission.

Mr. Davidian stated that if someone chose to go to an administrative hearing instead of participating in the program, the 15% policy should not be brought up in the administrative case. The statute gives the criteria for the penalty. He agreed that the program made a lot of sense, but only if it is used in the limited fashion for which it was designed. The 15% fine may be much higher than the amount an administrative law judge would want to impose. If the violator made an inadvertent error the policy should allow the violator to be penalized with a lower fine. He believed that the 15% fine was too high for unintentional violations.

Tony Miller commended the Enforcement Division for the implementation of the program. He believed that the program was very successful. He recommended Option 3, but also supported Option 1. The success of the program was evidenced by the increase in compliance. He congratulated the Commission and staff.

In response to a question, Mr. Russo speculated that participation in the program would not go down very much as a result of the increase in the maximum penalty to $5,000 if Option 1 is adopted. He expected that many people would pay the fine without going to an administrative hearing because they simply want to put the matter behind them.

Commissioner Downey noted that the voters increased the maximum fine to $5,000. Failure to report late contributions should be considered a serious concern because of the potential for abuse and because it misleads the electorate. For those reasons, he liked Option 1. On the other

hand, he liked the idea of providing an inducement to participate in the program as proposed in Option 3.

Chairman Getman noted that the discussion marked the first time that the Commission had held a policy discussion about the fine structure since the maximum fine for PRA violations was increased. The Commission should decide whether all maximum fines should simply be increased to $5,000, or whether a scale of fines should be developed for different types of violations. She encouraged the Commission to consider a scale, and to determine where late contribution reporting violations fit on that scale. She reminded the Commission that late contributions are reported by both the entity that gives the contribution and the entity that receives the contribution. Consequently, if one of them fails to report, the information is still made available by the other entity. She did not want the fines to be perceived as simply a cost of doing business. She suggested that a scale should allow the Commission to consider whether the violation was intentional and involved deliberate deception of the voters in an attempt to influence an election.

Chairman Getman agreed that the program represented a change by going from a fine per report to a fine per late contribution. In doing so, the Commission automatically increased the fine for late contribution reporting violations. The voters changed the maximum fine to $5,000 which represented another increase in the fines.

Chairman Getman preferred the fine policy of Option 3, capping the fines of the program at $3,500, which represented a big increase but would encourage violators to participate in the program because it would be lower than the possible $5,000 fine.

In response to a question, Mr. Russo explained that staff would like to retain the discretion to remove cases from the program if staff believed that the facts warrant it.

Commissioner Swanson discussed the importance of sending a message that late contribution reporting would not be tolerated.

Mr. Russo stated that the difference between Options 1 and 3 was the benchmark level. He agreed that the program should have a fine that provided an incentive to be in the program.

Chairman Getman suggested that Option 3 provided more flexibility for staff. If a case were more serious, under Option 1 the only way to pursue a larger fine would be to file a civil action. Under Option 3, there would be more latitude in the fines. More serious cases could be removed from the program in order to pursue a higher fine and still be an administrative action. Civil actions could then be preserved for those serious cases involving intentional misconduct.

Mr. Russo agreed. He supported either Option 1 or Option 3, and noted that Option 3 allowed for more flexibility. Option 1 would impose higher penalties under the streamlined program than Option 3. He suggested that it would take longer than 6 months to determine whether the option chosen by the Commission worked well.

Commissioner Swanson stated that Option 1 would be a better choice at the time because the election was so close and there was not enough time to test Option 3.

Chairman Getman responded that staff would be using the fine structure to pursue violations made during the primary election. In order to be fair, the test of the program should include both

the primary and general elections. That test should compare the number of violations and the number of people opting out of the program between the primary and general elections.

Commissioner Swanson supported Option 1.

Commissioner Knox supported Option 3.

Commissioner Downey supported Option 3.

Chairman Getman suggested that staff should report back after a year, addressing whether Option 3 was too lenient.

In response to a question, Commissioner Knox stated that he did not believe that a court test of the statutory maximum fine and the maximum fine under the program would occur, because the program was voluntary.

Chairman Getman added that the Commission might want to adopt the program as a regulation in order to give it more force and effect in administrative hearings.

Mr. Russo stated that Administrative Law Judges were interested in comparing fines imposed in like cases, and often asked enforcement staff for guidance. At that point, he believed that the ALJ could be informed about the program, noting that it is a voluntary program and non-binding. The ALJ may or may not consider the program fines to be a guide when the ALJ assesses a fine.

In response to a question, Mr. Russo agreed that the factors in Regulation 18361 are the primary determinants of what the fine should be. He believed that the streamlined program would, however, have some relevance to an ALJ in order to determine consistency.

Mr. Davidian stated that the concept of consistency makes no sense. The program was not a regulation and should not be considered at an ALJ hearing. If an ALJ asked about FPPC procedures for LCR cases, staff would be obligated to explain the policies. However, arguing a 15% fine at an administrative hearing would be inappropriate. Precedents, for purposes of cases that go to hearing, would be those cases that have gone to hearing, not cases settled through the program.

Commissioner Swanson vacated her previous motion. Commissioner Knox concurred.

Chairman Getman moved that staff continue the streamlined LCR program with the criteria for exclusion listed in the staff memo, with the fine structure that is listed under Option 3 in the memo.

Commissioner Downey seconded the motion.

Commissioner Swanson stated that she would vote for Option 3, but favored Option 1.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

Mr. Russo explained that there are some instances where violations involving only late contribution reporting have not been generated through the proactive program. He asked that staff be allowed to use the streamlined, one-page stipulation for those cases.

Chairman Getman moved that the streamlined one-page stipulation be used for those cases.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

Item #7, #8, #9, #10, #11, #12, #13a, #13b, #13c, #13d, #13e, #13f, #13g, #13h, #13i, #13j.

There being no objection, the following items were approved on the consent calendar:

Item #7. In the Matter of Citizens for a Better La Puente and Alex Espinoza III, FPPC No. 97/137. (9 counts.)
Item #8. In the Matter of Fidelity National Title Insurance Company, FPPC No. 98/761. (9 counts.)
Item #9. In the Matter of Union of American Physicians & Dentists Medical Defense Fund Electoral, and Peter A. Statti, M.D., FPPC No. 01/399. (2 counts.)
Item #10. In the Matter of Lorene Scalora, FPPC No. 99/64. (1 count.)
Item #11. In the Matter of Donna Coonan, FPPC No. 01 / 332. (2 counts.)
Item #12. In the Matter of David Smith, FPPC No. 01/663. (1 count.)
Item #13. Failure to Timely File Late Contribution Reports - Proactive Program.

- **a. In the Matter of Dario Frommer for Assembly, FPPC No. 2001-704.** (3 counts.)
- **b. In the Matter of Harris & Associates, FPPC No. 2002-16.** (1 count.**)**
- **c. In the Matter of Psomas, FPPC No. 2002-19.** (5 counts.)
- **d. In the Matter of Girardi & Keese, FPPC No. 2002-22.** (2 counts.)
- **e. In the Matter of HAT PAC, FPPC No. 2002-23.** (1 count.)
- **f. In the Matter of George Martin and Borton Petrini & Conron, LLP, FPPC No. 2002-28.** (5 counts.)
- **g. In the Matter of Robert Abernethy, FPPC No. 2002-30.** (3 counts.)
- **h. In the Matter of Marc & Jane Nathanson and Mapleton Investments & Affiliated Entities, FPPC No. 2002-32.** (2 counts.)
- **i. In the Matter of Calpine Corporation (and its affiliate Calpine and Bechtel Joint Development), FPPC No. 2002-95.** (4 counts.)
- **j. In the Matter of PBS&J, FPPC No. 2002-153.** (1 count.)

Item #13k. In the Matter of Marshall Ezralow & Affiliated Entities, FPPC No. 2002-154.

In response to a question, Mr. Russo explained that the fine amount of $1,030 was not 15% of $15,000, the amount not properly reported, because the individual paid a large penalty to the Secretary of State's office for late filing.

Commissioner Downey moved that the stipulation be approved.

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

Item #14. Legislative Report

Executive Fellow Scott Burritt presented three amended bills for the Commission's consideration.

AB1791 (Runner)

Mr. Burritt explained that provisions 1 and 4a of the staff analysis were the only provisions of the staff analysis that remained in the bill for the Commission's consideration, and distributed copies of the amended bill.

Executive Director Mark Krausse explained that the Assembly Elections Committee heard the bill earlier in the month. Staff expressed concerns at the hearing about any provision that would have prohibited the Commission from issuing any order that would fine a public agency for violations of the Act. They presented seven enforcement cases at the hearing that could not have been fined under the provisions of the proposed bill.

Mr. Burritt added that staff also expressed concern about the Commission serving as a repository for all statewide SEIs, and about the Code of Ethics provisions of the bill.

Chairman Getman stated that, since the Commission had not yet taken a position on the bill, staff presented their concerns at the hearing as they would be presented to the Commission.

Commissioner Knox noted that the Commission could hold a legislative subcommittee meeting to consider the bill and, if needed, take a position.

Chairman Getman agreed, noting that the subcommittee generally meets only when a position must be taken. Since the Commission's position would not have made a difference at this legislative hearing, the Commission position was reserved for a later stage in the process.

In response to a question, Mr. Krausse stated that Commissioner Knox and Chairman Getman were the subcommittee members. He noted that the bill died for lack of a second.

In response to a question, Mr. Krausse stated that the provisions of the proposed bill would have prohibited the Commission from taking action against the Department of Water Resources had it been in effect when the stipulation was approved in March 2002.

Mr. Burritt explained that the bill was left with a provision that would prohibit the Commission from fining governmental agencies for certain conduct, such as filing SEI's. Since governmental agencies do not file SEI's, the provision had no effect. The provision would have conflicted with Government Code § 825, which indemnifies employees against actions arising out of omissions occurring within the scope of their employment.

Mr. Krausse explained that the current version of the bill would prohibit the Commission from levying fines on public entities for the conduct of individuals. He noted that it made little sense and recommended an oppose position on that provision. Additionally, the proposed bill changed the deadlines for filing SEI's from 30 days to within 5 days of being employed by the agency.

Staff recommended that, since the Commission would be reviewing the SEI program later in the year, the change would be inappropriate at the current time. He noted that the bill was still under consideration and eligible for one more vote.

There was no objection from the Commission to opposing the bill in its current form.

AB 2366 (Dickerson)

Mr. Burritt explained that the bill had also been amended and distributed a copy of the amended version. Existing law provided a test to determine whether a retail store owner/public official had a financial interest in a customer. He explained that the proposed amendment would create an exception for retail stores that met the test for "significant segment" in jurisdictions with populations of 10,000 or less. The amended bill proposed increasing the earnings a retail business could receive from a customer from .1% to 1% of gross revenues before the customer would represent a financial interest. Staff believed that 1% of gross revenues could still represent a biasing influence. Mr. Burritt explained that there had been no reports that current law was a problem. Staff was aware of only one case that involved the issue. Since the Commission would be considering other regulations relating to small jurisdictions later in the year, staff recommended addressing the issue at that time and opposing the bill.

There was no objection from the Commission to opposing the bill.

AB 2642 (Maddox)

Mr. Burritt explained that the Secretary of State had the authority, in consultation with the Commission, to determine when the online campaign reporting requirement is operating effectively. When that determination is made, electronic filers would no longer be required to file campaign reports at the local level. The proposal in this bill had been considered by the Commission at the January meeting and the Commission chose to unanimously reject the proposal at that time. Enforcement Division relied on the local filings, and had pursued cases where the documents were not available at the SOS, but were found at the local offices. Since the FPPC used the statements for audit purposes, staff recommended that the Commission oppose the bill unless it is amended to provide that the Commission determines when the local copies of campaign statements can be eliminated.

There was no objection from the Commission to the staff recommendation.

AB 1797 (Harman)

Mr. Burritt explained that staff was working with Assemblyman Harman's office and with the League of Cities on the amendments to the bill, but that those amendments are not yet ready for the Commission's consideration. It was his understanding that the League of Cities was close to supporting the bill based upon some amendments that will be made, and staff hoped to present the bill to the Commission in May, 2002.

In response to a question, Chairman Getman stated that the Commission declined to support the bill at its March 2002 meeting, but asked that staff continue to work with the author and the League of Cities.

Mr. Krausse noted that there was still a provision in the bill that would require that officials not participate and leave the room when there is a potential conflict of interest, and that the conflict be disclosed on the record. Staff was not recommending a position on the bill yet. Staff had been in contact with the League of Cities, but did not yet have copies of the proposed amendments for review.

Item #15. Executive Director's Report

Mr. Krausse announced that the Public Education Unit received two awards by the State Information Officer's Council for their work on the Commission's 2000 Annual Report, and for the Reporter's Guide to the FPPC.

Chairman Getman congratulated staff, noting that the award was given for the first publication of the Public Education Unit.

Item #16. Litigation Report

Chairman Getman stated that the Litigation Report would be taken under submission.

The Commission adjourned to closed session at 12:05 p.m.

The Commission reconvened to open session at 4:45 p.m.

The Commission meeting was adjourned at 4:45 p.m.

Dated: May 9, 2002

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Getman